1984

Co-Vest Corp v. Boyd Corbett and Keith Gurr D/B/A Utah Ranchlands : Respondent's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

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CO-VEST CORP., a Utah	:	
Plaintiff - Respondent	:	No. 19334
vs.	:	
BOYD CORBETT and KEITH GURR d/b/a UTAH RANCHLANDS	:	
	:	
Defendants - Appellants	:	

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RESPONDENT'S BRIEF

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APPEAL FROM RULING OF
THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

HONORABLE GEORGE E. BALLIFF, JUDGE

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CASES CITED

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OF THE STATE OF UTAH

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RESPONDENT'S BRIEF

NATURE OF CASE

This is an appeal from a lower Court ruling denying defendants' Motion for Relief from Judgment, which was sought on the basis that the parties entered an Accord and Satisfaction of the prior Judgment entered against defendants.

DISPOSITION IN LOWER COURT

The Fourth Judicial District Court, The Honorable George E. Balliff presiding, ruled that defendants' Exhibit

No. 1 (R., p. 20) was not prepared for the purpose of effecting a compromise and settlement of plaintiff's Judgment and that defendants were not, therefore, entitled to relief from Judgment. The Court ordered that the stay of proceedings previously issued pursuant to the Writ of Execution be dissolved.

RELIEF SOUGHT ON APPEAL

Plaintiff - Respondent seeks to have the ruling of the lower Court affirmed so that it may proceed to enforce its Judgment against defendants.

STATEMENT OF FACTS

Plaintiff - Respondent Co-Vest Corporation (Co-Vest) controverts much of the Statement of Facts as put forth by Defendants - Appellants Boyd Corbett and Keith Gurr d/b/a/ Utah Ranchlands (defendants) and therefore, sets forth its own Statement of Facts relevant to this appeal, as follows:

Pursuant to a February 4, 1981 ruling of the Fourth Judicial District Court, Judgment was entered on

February 18, 1981, in favor of Co-Vest and against defendants. (R., pgs. 2 - 5). The Judgment having become final, collection activities were instituted by Co-Vest. (R., pg. 60). On December 31, 1981, the parties, through their respective counsel, entered into a settlement agreement which provided that Co-Vest would immediately receive $15,000.00 to be applied against the Judgment, with the balance of the Judgment, including all accrued interest, to be due and payable on January 1, 1983. This settlement agreement is not part of the record on appeal but is referred to at pages 33 and 60 of the record and on page 3 of Appellant's Brief. As part of that agreement, Co-Vest agreed to defer any collection efforts until after January 1, 1983. During the period of deferral, partial Satisfactions of Judgment were accorded to defendants by Co-Vest in order to enable defendants to transfer various parcels of property. (R., pgs. 35 - 36, 60 - 61).

Defendants did not pay the balance of the Judgment, including interest, on January 1, 1983, as they had agreed to do. (R., p. 34). Consequently, Co-Vest, through its attorney, attempted to execute against certain real property owned by defendant, Keith Gurr, (Gurr), and a Sheriff's Sale was scheduled with notice for March 1,

1983. (R., p. 65). Gurr made repeated overtures to Co-Vest's counsel, Carman E. Kipp and Stephen F. Hutchinson, toward some sort of compromise of the amount owing by defendants to Co-Vest, but such offers were uniformly rejected since the Judgment was secured by property upon which Co-Vest could execute and obtain funds sufficient to satisfy the entire amount owing. (R., p. 61). Two or three days prior to the Sheriff's Sale, Gurr contacted Co-Vest's co-counsel, Stephen F. Hutchinson, requesting an opportunity to forestall the execution sale by paying the balance owed. Gurr asked Mr. Hutchinson what the balance owing was; Mr. Hutchinson responded that only a cursory examination of the file had been undertaken and estimated the balance to be a figure in excess of $35,000.00. (R., p. 65). Gurr agreed to deliver a check for $20,000.00 on February 28, 1983, and an additional check of $10,000.00 within five (5) days thereafter, if Mr. Hutchinson would issue a Partial Release of Judgment Lien on certain parcels of land so that the parcels might be sold to a third party and the proceeds therefrom applied to the balance owed to Co-Vest. (R., p. 65).

On February 28, 1983, Gurr did deliver a check in the amount of $20,000.00, which was acknowledged by Mr.

Hutchinson by the document which defendants refer to as Exhibit 1. (R., p. 20) (Hereafter referred to as "February 28 document"). However, there was never any discussion between Gurr and Mr. Hutchinson to the effect that $35,000.00 was the actual balance owed or that Co-Vest would accept such amount in full and final settlement of the amount owing to Co-Vest. (R., p. 61, 66).

Defendants filed a Motion for Relief From Judgment on the basis that the February 28 document effected an accord and satisfaction of the amount owing by defendants. The Fourth Judicial District Court denied this Motion, ruling that the February 28 document was not prepared for the purpose of effecting an accord and satisfaction. (R., p. 6) Defendants appeal that ruling.

ARGUMENT

POINT I

THE DISTRICT COURT RULING MUST BE AFFIRMED UNLESS THERE IS NO REASONABLE BASIS IN THE EVIDENCE TO SUPPORT IT.

The lower Court proceeding consisted almost exclusively of the presentation of evidence and argument concerning the interpretation of the February 28 document.

Defendants argued that such document effected an accord and satisfaction of Co-Vest's Judgment against defendants. Defendants presented the testimony of Gurr to support their interpretation of the February 28 document. Co-Vest introduced two Affidavits to show that the document was not intended to effect an accord and satisfaction.

After reviewing the evidence, the Fourth Judicial District Court found that the February 28 document "was not prepared for the purpose of effecting a compromise and settlement of the judgment of plaintiff in this matter, but was a receipt of a $20,000.00 payment in exchange for termination of a Sheriff's Sale and a release of forty (40) acres." (R., p. 6).

This Court has long adherred to the basic principle of appellate review which provides that the ruling of the lower court must be affirmed unless there is no reasonable basis in the evidence to support it. In the Case of Carnesecca v. Carnesecca, 572 P.2d 708 (Utah, 1977), the Utah Supreme Court stated as follows:

> "The long-established rules of appellate review require this court to defer to the findings of the fact finder, rather than substitute our judgment therefor, and

> such holds true unless it can be determined as a matter of law that no one could reasonably find as did the fact finder.
>
> The rules also require us to view the evidence, including the fair inferences to be drawn therefrom, and all of the circumstances shown thereby, in the light most favorable to the successful party below." (footnotes omitted) Id. 710.

More recently the Court reaffirmed the principle, stating: "The findings and conclusions of the District Court must be affirmed unless there is no reasonable basis in the evidence to support them." Nielsen v. Chin-Hsien Wang, 613 P.2d 512 (Utah, 1980).

The Affidavits submitted by Co-Vest in the lower Court proceeding provide a sufficiently reasonable basis to support the ruling of the District Court. Based on the Rules of Appellate Review as specified above, the ruling of the District Court should be affirmed.

POINT II

THE FEBRUARY 28 DOCUMENT AND SURROUNDING CIRCUMSTANCES FAIL TO SHOW AN ACCORD AND SATISFACTION.

As defendants' Brief indicates, the case of Sugarhouse Finance Company v. Anderson, 610 P.2d 1369 (Utah,

1980) sets forth the essential components of a valid accord and satisfaction as follows:

1. A proper subject matter;

2. Competent parties;

3. An assent or meeting of the minds of the parties;

4. A consideration given for the accord.

As the evidence presented at the lower Court hearing demonstrates, at least two of these elements are lacking in the instant case.

The first component lacking is an assent or meeting of the minds. In regard to this element, this Court has stated as follows:

> "To effect an accord and satisfaction, payment must result from declarations of such a clear nature as to assure that the parties are aware of the extent and scope of such agreement." Messick vs. PHD Trucking Service, Inc., 615 P.2d 1276 (Utah, 1980).

The record in this case discloses that such clarity of understanding between the parties was lacking. The attorneys for Co-Vest never agreed or intended to enter an

accord and satisfaction. (See Affidavits at R., pgs. 60 - 67). Furthermore, the testimony of defendant Gurr indicates that the requisite clarity of understanding to effect an accord and satisfaction was lacking. At page 29 of the record, the following interchange occurred between Gurr and his attorney:

> "Q. And is the $35,000 figure, as you understood it, to be the final amount of the Judgment?
>
> A. Yes. In fact, when I got their [sic], Steve had a lot of stuff out on his desk, and he was figuring up stuff on a yellow paper, and he come [sic] up with a figure around Thirty Three Thousand Dollars that we owed."

If, in fact, the correct figure were $33,000.00, as Mr. Gurr's testimony indicates, it would have been foolish indeed for him to agree to pay $35,000.00 in settlement of that amount. The requisite clear understanding as to the extent and scope of any alleged accord and satisfaction is obviously lacking here.

Similarly lacking is the element of consideration. The debt involved in this action is a result of a final Judgment entered against defendants. The amount was liquidated and undisputable. In a similar case

involving a liquidated and non-contingent debt, this Court stated as follows:

> "The payment of a part of a debt (in situations such as the one at hand), does not discharge it, even though the debtor exacts a promise that it will do so. The debtor, by making part payment is doing nothing more than he is legally obligated to do; and, therefore, he gives the creditor no consideration for the promise that part payment will be accepted to discharge the entire debt." (footnotes omitted) Allen Howe Specialties Corp., v. U.S. Construction, Inc., 611 P.2d 705, 710 (Utah, 1980).

Defendants, upon paying part of the amount owing to Co-Vest, could not discharge their liability to pay the full amount, even if the February 28 document is held to be a promise by Co-Vest to accept partial payment as full and final settlement.

Defendants argue, however, in Point IV of their Brief, that the consideration substitute of promissory estoppel should apply. This doctrine is inapplicable to the instant proceeding because no detriment has been incurred by defendants. Defendants argue that they suffered some sort of detriment by reason of the accommodations extended to them by Co-Vest. The truth is, however, that defendants

were benefitted by the actions of Co-Vest. On the day the accommodations were extended to defendants, Co-Vest was prepared to go forth with a Sheriff's Sale, whereby it would have realized full payment of the amount of its Judgment against defendants. However, at the urging of Defendant Gurr, Co-Vest agreed to forestall the Sheriff's Sale so that other payment arrangements could be worked out. Rather than suffer any detriment, defendants were benefitted by such an arrangement. Therefore, promissory estoppel does not apply in this case.

POINT III

SINCE THE FEBRUARY 28 DOCUMENT WAS AMBIGUOUS, INTRODUCTION OF EXTRINSIC EVIDENCE WAS PROPER.

Co-Vest agrees with the statement of defendants that extrinsic evidence should be allowed only if the instrument to be construed is unclear or unambiguous. However, the February 28 document is ambiguous on its face. The most the document purports to be is an acknowledgment. Nothing therein would indicate that the parties agreed upon anything. To conclude that this document in and of itself sets forth clearly the terms and

understandings between the parties is ludicrous. The introduction of extrinsic evidence to shed light on the meaning of this document was entirely proper.

Defendants further argue that when the lower Court allowed extrinsic evidence, it should have interpreted the terms of the alleged agreement strictly against Co-Vest, who, through its attorney, drafted the document. Defendants cite the case of Continental Bank and Trust Co. v. Bybee, 306 P.2d 773 (Utah, 1957) in support of this proposition. However, that case is inapplicable to the situation involved in this case. In Continental, the Court held that where a party to a contract was both the attorney-draftsman of and a party to the instrument, the proper construction of the instrument should be strictly against him. In the instant action, the attorney-draftsman is not a party to the instrument. The attorney was not signing in his individual capacity, but was signing in his capacity as counsel for Co-Vest. The lower Court did not err in failing to interpret the terms strictly against Co-Vest.

POINT IV

EVEN IF THE INTRODUCTION OF EXTRINSIC EVIDENCE WAS IMPROPER, DEFENDANTS FAILED TO OBJECT TO ITS INTRODUCTION AT THE LOWER COURT PROCEEDING AND MAY NOT RAISE THIS POINT ON APPEAL

Defendants argue that the lower Court erred in allowing extrinsic evidence to be considered in construing the terms of the February 28 document. However, defendants failed to object to the introduction of extrinsic evidence at the lower Court hearing. Furthermore, defendants themselves introduced extrinsic evidence to construe the terms of the document.

Following the introduction of defendants' evidence, the following interchange occurred at the hearing:

> "The Court: All right. What did you want to do by way of your presentation, Mr. Hutchinson?
>
> Mr. Hutchinson: I think we would have some argument, but I think our Affidavits cover the evidentiary portion of our case.
>
> The Court: Do you have any objection to the Affidavits?
>
> Mr. Anderson: We have no objection at all, your Honor." (R., pgs. 41, 42)

This Court has ruled that when a party fails to object to the introduction of testimony in the lower Court proceedings, that party is in no position to raise the matter on appeal for the first time. In Dugger v. Cox, 564 P.2d 300 (Utah, 1977), the defendant contested the award of attorney's fees to plaintiff because of a lack of evidence submitted on the issue. The Court stated as follows:

> "The only evidence presented by plaintiff on this point was his personal testimony that $3,000.00 was a reasonable amount for attorney's fees. Cox failed to object to testimony of plaintiff (not a lawyer) and failed to cross-examine on this issue, and is in no position to raise the matter here for the first time." Id., at p. 303.

See also Condas v. Condas, 618 P.2d 491 (Utah, 1980) ("Defects curable at trial cannot be relied upon by a party if the trial court has had no opportunity to rule thereon.").

Defendants, having failed to object to the introduction of extrinsic evidence as to the interpretation of the Feburary 28 document, are precluded from raising this issue for the first time on appeal, particularly since defendants introduced their own extrinsic evidence.

POINT V

SINCE NO ACCORD AND SATISFACTION WAS SHOWN BY DEFENDANTS, CO-VEST HAD NO NEED TO AVOID THE ACCORD AND SATISFACTION BY CLEAR AND CONVINCING EVIDENCE.

Defendants argue in Point II of their Brief that Co-Vest failed to avoid the accord and satisfaction by clear and convincing evidence. However, defendants' argument presupposes that a valid accord and satisfaction has been established.

The party alleging accord and satisfaction is required to meet the burden of proof as to every necessary element. Messick v. PHD Trucking Service, Inc., 615 P.2d 1276 (Utah, 1980). The lower Court, presented with the evidence of both Co-Vest and defendants, concluded that defendants did not meet their burden of proof in establishing an accord and satisfaction. Since defendants failed in the first instance to establish an accord and satisfaction, Co-Vest had no burden of presenting any evidence, much less clear and convincing evidence, to avoid the accord and satisfaction. Defendants' argument, therefore, that Co-Vest failed to avoid the accord and

satisfaction by clear and convincing evidence is inapplicable.

CONCLUSION

Co-Vest obtained a Judgment against defendants. An agreement was entered whereby defendants might defer final payment on the Judgment for one year. Defendants thereafter failed to pay the remaining amount owing upon the agreed date. Co-Vest executed upon and initiated a Sheriff's Sale of defendants' property. As an accommodation to defendants, Co-Vest cancelled the Sheriff's Sale and released from the Judgment Lien some of defendants' property to enable defendants to pay off the Judgment. Defendants attempted to show that such arrangement effected an accord and satisfaction. Defendants failed to carry their burden of proof in establishing the accord and satisfaction and the District Court ruled against them and in favor of Co-Vest.

Respondent Co-Vest requests that the ruling of the District Court should be affirmed.

DATED this 12th day of December, 1983.

Respectfully submitted,

KIPP AND CHRISTIAN, P.C.

STEPHEN F. HUTCHINSON

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CERTIFICATE OF MAILING

MAILED, postage prepaid, this 12th day of December, 1983, a true and correct copy of the foregoing Respondent's Brief on this 12th day of December, 1983, to the following:

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